



In The
Supreme Court of the United States
October Term, 1976

No. 76 - 1337

VIRGINIA STATE BAR, ET AL.,

Appellants,

v.

CONSUMERS UNION OF UNITED STATES, ET AL.,

Appellees.

No. 76-1225

CONSUMERS UNION OF UNITED STATES, INC.,
AND VIRGINIA CITIZENS CONSUMER COUNCIL,

Appellants,

v.

VIRGINIA STATE BAR, ET AL.,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

**JURISDICTIONAL STATEMENT AND MOTION TO AFFIRM
ON BEHALF OF VIRGINIA STATE BAR, ET AL.**

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PRELIMINARY STATEMENT

A jurisdictional statement has been filed in this case by Consumers Union of United States, Inc. and Virginia Citizens Consumer Council in No. 76-1225. This brief is in support of the appeal filed by the defendants and in response to the jurisdictional statement in No. 76-1225.

OPINIONS BELOW

The opinions of the District Court have not been officially reported. They are set forth at pages 1a through 65a of the Appendix to the Jurisdictional Statement in No. 76-1225.

JURISDICTION

This suit was instituted by the appellees (hereinafter "plaintiffs" or "CU") seeking declaratory and injunctive relief that Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility be declared unconstitutional insofar as it allegedly violated plaintiffs' First and Fourteenth Amendment rights to gather and make public certain information about lawyers.

A three-judge court was convened pursuant to 28 U.S.C. § 2281. A judgment was rendered on December 17, 1976, declaring DR2-102(A)(6) unconstitutional insofar as it prohibited the publication of certain information in CU's proposed directory and enjoining the enforcement of DR2-102(A)(6) with respect to such information. Plaintiffs filed a notice of appeal on January 5, 1977, from that portion of the judgment which denied certain requested relief. Appellants, herein, filed their notice of cross-appeal on January 25, 1977, from that portion of the judgment which granted the requested relief. App. 1.

This Court has jurisdiction over the appeal under 28 U.S.C. § 1253. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971), sustains the jurisdiction of this Court.

STATUTE INVOLVED

This appeal involves the constitutionality of Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional

Responsibility. It is set forth at pages 7a through 9a of the Appendix to the Jurisdictional Statement in No. 76-1225.

QUESTIONS PRESENTED

1. Whether the Supreme Court of Virginia may, pursuant to its authority to regulate the practice of law in the Commonwealth of Virginia, constitutionally proscribe the publication of information by attorneys in the manner set forth in DR2-102(A)(6) of the Virginia Code of Professional Responsibility?
2. Whether the advertising of professional fees by lawyers is "inherently deceptive" and, therefore, subject to being constitutionally proscribed?
3. Whether the court below should have dismissed this action under the doctrine of comity?
4. Whether the court below should have dismissed this action against the defendants as they are not "persons" within the meaning of 42 U.S.C. § 1983?

STATEMENT OF THE CASE

Consumers Union of United States, Inc. and Virginia Citizens Consumer Council filed this action on February 27, 1975, requesting that DR2-102(A)(6) of the Virginia Code of Professional Responsibility be declared unconstitutional, both on its face and as applied by the defendants and that its enforcement be enjoined. The Rule in substance prohibits advertising by attorneys with specific exceptions. The information sought to be published by the plaintiffs manifestly was not permitted by the Rule; and, therefore, lawyers presumably would not provide to the plaintiffs the requested information. The information sought to be published related

to, *inter alia*, the fees charged by lawyers for a variety of professional services, the percentage of a lawyer's time devoted to various fields of practice and the number of para-professionals employed by an individual lawyer.

Defendants were the President of the Virginia State Bar, ("State Bar") the Chairman of the Legal Ethics Committee of the Virginia State Bar, the Supreme Court of Virginia, the Chief Justice of the Supreme Court of Virginia and the American Bar Association ("ABA"). Both jurisdictional and substantive defenses were raised.

The Court stayed proceedings while the ABA and the State Bar conducted studies of the advisability, if any, of amending DR2-102(A)(6). The ABA made certain changes to its proposed rule on February 14, 1976. A substantially similar change in DR2-102(A)(6) was proposed by the State Bar to the Supreme Court of Virginia by petition on April 7, 1976. The Court rejected the proposed amendment on April 20, 1976, on the basis that it would "not serve the best interests of the public or the legal profession."

The case was tried on May 18, 1976, and decided on December 17, 1976. Three separate opinions were written. Judge Merhige found that the fee information, as well as the non-fee information, sought to be published could not be proscribed. Judge Warriner concurred in Judge Merhige's opinion as to the non-fee information; however, he dissented as to the publication of fee information with the exception of a consultation fee. Judge Bryan would have dismissed the case on the doctrine of comity since the rule under attack was that of a sovereign state supreme court. Thus, the opinion of the court is that part of Judge Merhige's opinion concurred in by Judge Warriner.

Defendants argued that the "false, misleading and deceptive" standard advanced by the plaintiffs was virtually unenforceable as applied to advertising by attorneys. This argu-

ment was based upon the deposition of an expert of many years in the disciplinary field. The court rejected the argument despite the fact that plaintiffs offered no countervailing evidence by anyone with any substantial experience in disciplinary enforcement. Since Judge Bryan would have dismissed the case and Judge Warriner agreed with the defendants that fee advertising is inherently deceptive and, therefore, not constitutionally protected, plaintiffs' request to advertise fee information was denied by the court.

**THE QUESTIONS PRESENTED ARE SUBSTANTIAL
AND MAY REQUIRE PLENARY CONSIDERATION
BY THIS COURT**

That the questions presented here are substantial is probably indisputable. Some are already before this Court in *Bates v. Arizona State Bar*, No. 76-316, *prob. juris. noted*, 97 S.Ct. 53 (1976). What is at stake in this case, as in *Bates*, is the extent to which a state is to be permitted to regulate the practice of law within its borders, for it cannot be overlooked that the disciplinary rules under attack here are those promulgated by the Supreme Court of Virginia, governing the conduct of attorneys in Virginia. This Court's decision in *Bates* may well provide the answers to the questions raised herein. We will not undertake to speculate as to the possible resolutions of *Bates* and to analyze the present case under each of them. We would point out, however, that should this Court undertake to scrutinize within a constitutional framework proposed professional advertisements item by item, a position we urge this Court to reject, the present case may well provide a suitable one for analysis because of the variety of information which CU proposes to publish. In any event it would appear to be appropriate, as plaintiffs suggest in No. 76-1225, to postpone consideration of the Jurisdictional Statement until after the decision in *Bates*.

CONCLUSION

For the reasons stated, this Court should defer action on the Jurisdictional Statement and Motion to Affirm until after the decision in *Bates*.

Respectfully submitted,

VIRGINIA STATE BAR, ET AL.

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 75-0105-R

Consumers Union of United States, Inc., *et al.*,
v.
American Bar Association, *et al.*,
Defendants.

NOTICE OF CROSS-APPEAL

Filed January 25, 1977

Pursuant to 28 U.S.C. §§ 1253 and 2101(b), defendants, Virginia State Bar, Howard W. Dobbins, Rothwell J. Lillard, the Supreme Court of Virginia, and Mr. Justice Harold S. Snead, hereby cross appeal from the judgment of this Court, entered December 17, 1976, with respect to that portion of the judgment which permits advertising by plaintiffs, Consumers Union of the United States, Inc. and the Virginia Citizens Consumer Council.

Respectfully submitted,

VIRGINIA STATE BAR, ET AL.

By: /s/ John Hardin Young
Counsel

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Certificate

I hereby certify that a true and complete copy of the foregoing Notice of Cross-Appeal was mailed, postage prepaid, to Peter H. Schuck, Esquire, 1714 Massachusetts Avenue, N.W., Washington, D. C. 20036; James W. Benton, Jr., Esquire, Hill, Tucker & Marsh, 214 East Clay Street, P.O. Box 27363, Richmond, Virginia 23261; and John H. Shenefield, Esquire, Hunton & Williams, P.O. Box 1535, Richmond, Virginia 23212, this 25th day of January, 1977.

/s/ John Hardin Young